ANANDA KUMAR KRISHNAN v. NG CHIN TAI (TRADING IN THE NAME AND STYLE OF LEAN SEH FISHERY) & ANOR; TESCO STORES (MALAYSIA) SDN BHD (GARNISHEE)

HIGH COURT MALAYA, PULAU PINANG
ABDUL WAHAB MOHAMED JC
[CIVIL SUIT NO: 22-413-2010]
1 SEPTEMBER 2016

CIVIL PROCEDURE: *Stay of proceedings – Application for – Application to stay execution proceedings of garnishee order – Factors considered – Financial position of plaintiff – Whether plaintiff able to refund amount payable under garnishee absolute order – Whether there were special circumstances – Whether there was contractual relationship between parties – Whether refusal of stay would put defendant at risk – Whether application ought to be allowed*

CIVIL PROCEDURE: *Judgments and orders – Garnishee order – Application to stay execution proceedings of garnishee order – Factors considered – Financial position of plaintiff – Whether plaintiff able to refund amount payable under garnishee absolute order – Whether there were special circumstances – Whether there was contractual relationship between parties – Whether refusal of stay would put defendant at risk – Whether application ought to be allowed*

This was an application by the garnishee/defendant for garnishee trial ('Tesco Stores') for all execution proceedings of the garnishee order against Tesco Stores to be stayed until after the full and final disposal of the appeal in the Court of Appeal. The background facts were that the plaintiff obtained a garnishee order *nisi* ('garnishee order *nisi*') on Tesco Stores. In contravention of the garnishee order *nisi*, Tesco Stores made a payment amounting to RM670,242.43 to the second defendant. Thereafter, during the date fixed for show cause, Tesco Stores informed this court that Tesco Stores allegedly did not owe any money to the second defendant and there was no debt to be garnished. After a full trial, the court ruled in favour of the plaintiff and awarded garnishee order absolute amounting to RM3,179,014.47 together with costs of RM10,000 ('the said judgment'). Tesco Stores thereafter filed notice of appeal to the Court of Appeal against the said judgment. Tesco Stores also filed an application for stay of execution of the said judgment pending outcome of the appeal. The Tesco Stores submitted, *inter alia*, that (i) the plaintiff may not be able to refund the amount payable being RM3,179,014.47 and costs of RM10,000 (total amount payable) under the garnishee absolute order.; (ii) there were special circumstances that would justify the granting of the stay; (iii) the plaintiff was a stranger or third party to Tesco Stores as they did not maintain any contractual relationship and nexus between one another; and (iv) the plaintiff was not likely to be able to repay the total amount payable in the event Tesco Stores' appeal was allowed. Thus, the garnishee's appeal may be rendered nugatory if the stay was refused.

A **Held (allowing application):**

(1) There was a high risk and possibility that the plaintiff may not be able to pay back the total amount payable to Tesco Stores if the latter's appeal was allowed. The plaintiff's affidavit did not convince the court that he was financially capable to repay the total amount in the event
B Tesco Stores' appeal was allowed. Furthermore, the plaintiff and Tesco Stores did not maintain any contractual relationship and nexus between one another. (paras 25 & 26)

(2) Besides Tesco Stores' appeal against the garnishee order absolute, the defendants also had filed an appeal against the judgment which was also
C pending appeal in the Court of Appeal. If the defendant's appeal was allowed, this would lead to the garnishee proceeding becoming completely academic. (para 27)

(3) The refusal of a stay will put Tesco Stores at risk and there was an
D imminent possibility that the plaintiff would not be able to return the sums paid under the judgment to Tesco Stores in the event the defendants or Tesco Stores succeeded in its respective appeals at the Court of Appeal. Therefore, Tesco Stores had succeeded in showing that there were special circumstances in this case. (paras 30 & 31)

E **Case(s) referred to:**

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Leong Poh Shee v. Ng Kat Chong [1965] 1 LNS 90 HC ***(refd)***

Mohd Kamaruzzaman Mustaffa v. Aerotree Defence & Services Sdn Bhd & Ors [2015] 3 CLJ 390 ***(refd)***

F *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1974] 1 LNS 136 FC* ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 73

Rules of Court 2012, O. 55 r. 16

G *For the others parties intervener of the 3rd party - Gurmeet Kaur; M/s Shaikh David Raj*

Reported by Suhainah Wahiduddin

JUDGMENT

H **Abdul Wahab Mohamed JC:**

Introduction

[1] This is an application by the garnishee/defendant for garnishee trial (hereinafter referred to as "Tesco Stores") for all execution proceedings of
I the garnishee order absolute dated 21 July 2016 against Tesco Stores to be stayed until after the full and final disposal of the appeal in the Court of Appeal.

Backgrounds Facts

[2] The plaintiff obtained a garnishee order *nisi* on 21 October 2015 (hereinafter referred to as "garnishee order *nisi*") and served the garnishee order *nisi* on Tesco Stores on 22 October 2015.

[3] In contravention of the garnishee order *nisi*, Tesco Stores among others made a payment amounting to RM670,242.43 to the second defendant on 23 October 2015. Thereafter during the date fixed for show cause, Tesco Stores informed this Honourable Court that Tesco Stores allegedly do not owe any money to the second defendant and there was no debt to be garnished.

[4] After a full trial on 11 April 2016, this Honourable Court ruled in favour of the plaintiff on 21 July 2016 and awarded garnishee order absolute amounting to RM3,179,014.47 together with cost of RM10,000 (hereinafter referred to as "the said judgment")

[5] Tesco Stores thereafter had filed notice of appeal to the Court of Appeal dated 22 July 2016 against the said judgment.

[6] Thereafter, Tesco Stores also filed an application for stay of execution of the said judgment pending the outcome of the appeal.

Garnishee's (Tesco Stores) Submission

[7] Tesco Stores submits that the plaintiff, being an individual, highly probable, may not be able to refund the amount payable being RM3,179,014.47 and cost of RM10,000 (total amount payable) under the garnishee absolute order dated 21 July 2016.

[8] Generally Tesco Stores submits that there are special circumstances that would justify the granting of the stay. The garnishee also submitted that there is high risk of total dissipation by the plaintiff of the total amount payable in the event Tesco Stores' appeal against the garnishee absolute order is allowed by the Court of Appeal.

[9] In addition, the plaintiff is a stranger or third party to Tesco Stores. The plaintiff and Tesco Stores do not maintain any contractual relationship and nexus between one another. Any debt would before the garnishee order absolute be owed to the defendant and not the plaintiff.

[10] Tesco Stores further submitted that the plaintiff is not likely to be able to repay the total amount payable in the event Tesco Stores' appeal is allowed. Thus, the garnishee's appeal may be rendered nugatory if the stay was refused.

[11] Furthermore the defendant's appeal against the judgment which forms the basis of the garnishee proceedings is also pending appeal.

Plaintiff's Submission

[12] The plaintiff submitted that there is no proof which suggests that a serious or irreparable injury would result to Tesco Stores if a stay is not granted.

[13] However the plaintiff would be gravely prejudiced in the event a stay is granted, since the plaintiff's case against the defendants were initiated since the year 2006 and only obtained judgment against the defendants after approximately ten years. Thus the plaintiff had succeeded in his action, he should be allowed to enjoy the fruit of his litigation by pursuing any methods for execution as permitted by law.

[14] The plaintiff further submitted that when plaintiff initiated execution proceedings against the defendants by garnishing Tesco Stores on 22 October 2015, Tesco Stores chose to intentionally disobey the garnishee order *nisi* which caused unnecessary further delay for the plaintiff to enjoy the fruits of his successful litigation.

[15] On issue of the plaintiff's financial position, the plaintiff submitted that the burden of proof is on Tesco Stores to prove that the plaintiff is insolvent and Tesco Stores has not shown any proof. On the other hand, the plaintiff is a prominent businessman and a former auditor of Price Water House. The plaintiff also is the Chairman of Trillionaire Entertainment Sdn Bhd, a company supplying content to the Government of Malaysia.

[16] Moreover, the plaintiff was awarded a judgment of RM19,266,746.16 and cost of RM30,000 on 11 September 2015 against the defendants which surely would prove that the plaintiff's net worth is multiple times the quantum of the said judgment sum of RM3,179,014.47 plus cost RM10,000. Therefore Tesco Stores' argument on this issue is a baseless, unsubstantiated and speculative.

[17] In contrast, the plaintiff submitted that Tesco's audited accounts for the year ending 28 February 2015 shows that Tesco incurred a huge and material loss of RM289,016,000 which means that Tesco has insufficient money to finance Tesco's day to day operation. In addition Tesco has deferred tax of RM83,016,000 as at 28 February 2016 which means that Tesco will not be able to pay the deferred tax when the tax becomes due, based on Tesco's current and pressing deficit cash flow of RM20,049,000. As such, if a stay is granted, there is very real risk that Tesco may dispose of its assets thereby leaving the plaintiff with a "paper judgment".

The Law

[18] Section 73 of the Courts of Judicature Act 1964 provides as follows:

> 73. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceedings shall be invalidated except so far as the Court of Appeal may direct.

[19] Order 55 r. 16 Rules of Court 2012 provides: A

> (1) An appeal shall not operate as a stay of execution under the decision appealed against except in so far as the Court appealed from or the High Court may order, and any application for stay shall be made in the first instance to the Court appealed from.
>
> (2) The Court appealed from or the High Court may grant an order of stay of execution on such terms as it thinks fit. B

Finding Of Court

[20] This is an application by the garnishee (Tesco Stores) *inter alia* for all execution proceedings of garnishee order absolute dated 21 July 2016 against Tesco Stores to be stayed until after the full and final disposal of the appeal in the Court of Appeal. C

[21] It is trite law as provided in s. 73 of the Courts of Judicature Act 1964 that an appeal does not operate as a stay. Nevertheless in landmark case of *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1, the Federal Court held as follows: D

> The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. The reasons must relate to the enforcement of the judgment.

[22] The principle of this landmark case has also been cited in the case of *Mohd Kamaruzzaman Mustaffa v. Aerotree Defence & Services Sdn Bhd & Ors* [2015] 3 CLJ 390: E

> (1) The test for a stay of execution was to determine whether there were special circumstances to justify a stay. Section 73 of the Courts Judicature Act 1964 ('CJA') only applied to an appeal not operating as a stay. Since an appeal did not operate as a stay, then similarly there was no reason that a pending application to set aside a consent judgment should operate as a stay. Therefore, the defendant's pending application to set aside the consent judgment did not operate as an automatic stay of execution. F

[23] Having gone through the law, the guiding principles on whether to grant a stay of execution is the question whether the unsuccessful party can show special circumstances to justify a stay. G

[24] Now, I would here highlight the significance of the words 'special circumstances'. In the case of *Leong Poh Shee v. Ng Kat Chong* [1965] 1 LNS 90; [1966] 1 MLJ 86 by Raja Azlan Shah J (as he then was) His Lordship attempted to define 'special circumstances' as follows: H

> Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common. I

[25] On the issue raised by Tesco Stores that challenging the plaintiff's financial position, I am of the view that there is a high risk and possibility that the plaintiff may not be able to pay back the total amount payable to Tesco Stores if Tesco Stores' appeal is allowed.

[26] It had to be borne in mind that what we were dealing with here was the large amount of sum RM3,179,014.47 plus costs of RM10,000. The plaintiff's affidavit does not convince me that he is financially capable to repay the total amount in the event Tesco Stores' appeal is allowed. Furthermore, the plaintiff and Tesco Stores do not maintain any contractual relationship and nexus between one another.

[27] It is pertinent for me as well to note that besides Tesco Stores' appeal against the garnishee order absolute, the defendants also had filed an appeal against the judgment which is also pending appeal in the Court of Appeal. If the defendant's appeal is allowed, this will lead to the garnishee proceeding become completely academic.

[28] At this juncture, I am agreeable with the decision in the case of *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 wherein the Federal Court set the test for special circumstances which would justify a stay and the main factor is the concept of 'nugatoriness'. Augustine Paul FCJ said in his judgment:

> It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words special circumstances is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstances has been established.

[29] In the case of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No. 2)* [1974] 1 LNS 136; [1976] 1 MLJ 131 Lee Hun Hoe CJ (Borneo) in writing for the Federal Court said in clear and lucid terms at p. 132:

> An appeal which would be nugatory if stay was refused by reason of the poverty of the respondent would be an example of special circumstances …

[30] For completeness, I am of the considered view that the refusal of a stay will put Tesco Stores at risk and there is an imminent possibility that the Plaintiff will not be able to return the sums paid under the judgment to Tesco Stores in the event the Defendants or Tesco Stores succeeds in its respective appeals at the Court of Appeal.

Conclusion

[31] In conclusion, based on the above said reasons, Tesco Stores (the garnishee) had succeeded to show me that there are special circumstances in this case.

[32] Therefore the garnishee's application is allowed on condition that within seven days the garnishee had to deposit the amount of RM3,179,014.47 into this Honourable court. Cost of this application shall be based on the direction of the Court of Appeal when the appeal is heard.